



## DEFENCE FOI 755/22/23 STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [REDACTED] (the applicant) under the *Freedom of Information Act 1982* (FOI Act) for access to:

*1. Briefing and talking points provided to the Minister for Defence, the Hon Richard Marles MP, for his participation in the 8th Australia-Indonesia 2+2 Defence and Foreign Ministers' meeting held Canberra on 9 February 2023, and for hosting further discussions with the Indonesian Defence Minister in Canberra on 10 February 2023; and*

*2. Any biographical briefing, background material or other documents provided to Defence Minister Marles that relate to the life and career of Indonesian Defence Minister Prabowo Subianto related to documents that Defence provided to Defence Minister Marles on Minister Prabowo in capacity of the two meetings motioned in item one.*

### FOI decision maker

2. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

### Documents identified

3. I identified two (2) documents as matching the description of the request.

### Exclusions

4. Personal email addresses, signatures, PMKeyS numbers and mobile telephone numbers contained in documents that fall within the scope of the FOI request, duplicates of documents, and documents sent to or from the applicant are excluded from this request. Defence has only considered final versions of documents.

### Decision

5. I have decided to:

- a. partially release two (2) documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under sections 33 [documents affecting national security, defence or international relations], 47E [public interest conditional exemptions – certain operations of agencies] and 47F [public interest conditional exemptions - personal privacy] of the FOI Act; and
- b. remove irrelevant material under section 22 of the FOI Act.

### Material taken into account

6. In making my decision, I had regard to:

- a. the terms of the request;
- b. the content of the identified documents in issue;
- c. relevant provisions in the FOI Act;

- d. the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
- e. advice received from subject matter experts within the International Policy Division.

## **Reasons for decision**

### **Section 22 – Access to edited copies with exempt or irrelevant matter deleted**

7. Section 22 of the FOI Act permits an agency to prepare and provide an edited copy of a document where the agency has decided to refuse access to an exempt document or that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.

8. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the documents to you in an edited form.

### **Section 33 – Documents affecting national security, defence or international relations**

9. Section 33(a) of the FOI Act states:

*A document is an exempt document if disclosure of the document under this Act:*

*(a) would, or could reasonably be expected to, cause damage to:*

- (i) the security of the Commonwealth*
- (ii) the defence of the Commonwealth*
- (iii) the international relations of the Commonwealth.*

10. In regards to the terms 'would or could reasonably be expected to' and 'damage', the Guidelines provide:

*5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.*

*5.17 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.*

11. In regards to the security of the Commonwealth, defence of the Commonwealth and international relations the Guidelines provide:

*5.31 The meaning of 'damage' has three aspects:*

- i. that of safety, protection or defence from something that is regarded as a danger. The AAT has given financial difficulty, attack, theft and political or military takeover as examples.*
- ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.*
- iii. the organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.*

...

*5.34 Previous Administrative Appeals Tribunal (AAT) decisions indicate that the term includes:*

- *meeting Australia's international obligations*

- *ensuring the proper conduct of international defence relations*
- *detering and preventing foreign incursions into Australian territory*
- *protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.*

...

*5.37 ... The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must also be real and substantial grounds for the exemption that are supported by evidence. These grounds are not fixed in advance, but vary according to the circumstances of each case.*

12. Additionally, the Guidelines provide at paragraph 5.36:

*5.36 The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.*

13. The Guidelines, at paragraph 5.16, provide that the term 'reasonably expected' requires consideration of the likelihood of the predicted or forecast damage. In particular, at paragraph 5.27, the Guidelines indicate that there must be 'real' and 'substantial' grounds for expecting the damage to occur, which can be supported by evidence or reasoning. A mere allegation or possibility of damage will be insufficient for the purposes of the exemption.

14. Having considered the Guidelines in relation to the identified documents, I have formed the view that, disclosure of the relevant information in the documents would, or could reasonably be expected to, cause damage.

15. I identified material in the document, which, upon release, could reasonably be expected to cause damage to the security of the Commonwealth by making public a sensitive information about Australia's strategies, policies and capabilities that could potentially allow non-allied actors with hostile intentions to exploit the Australian Defence Force as well as other international forces.

16. Furthermore, I find that disclosure of the document would, or could reasonably be expected to, cause damage to the defence of the Commonwealth. In making the Defence this information publically known, Nation States not allied with Australia could take steps or devote resources and exploit weaknesses causing damage to the defence of the Commonwealth.

17. The documents also contain information relating to Australia's relationship with foreign governments. Release of this information could reasonably be expected to cause damage to those relationships. Any damage to international confidence and close relationships with other countries would seriously affect Defence's ability to deliver on its obligations to protect Australia's interests and government and foreign officials may be less willing to engage with Australian government officials and Australian businesses in the future.

18. Based on my consideration of the above, I am of the view that release of the relevant information in the documents could reasonably be expected to cause damage to the national security, defence and international relations of the Commonwealth.

19. It is for these reasons I have decided that the relevant information in the documents is exempt under sections 33(a)(i), 33(a)(ii) and 33(a)(iii) of the FOI Act.

## **Section 47E - Public interest conditional exemptions – certain operations of agencies**

20. Upon examination of the material, I identified documents containing information relating to Defence personnel contact details and identification and financial management codes.

21. Section 47E of the FOI Act states:

*A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:*

...

*(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

22. The Guidelines explain the term ‘substantial adverse effect’ to broadly mean:

*5.20 ... an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person. The word ‘substantial’, taken in the context of substantial loss or damage, has been interpreted as ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal.’*

23. The Guidelines further explain:

*6.101 For the grounds in [section 47E(d)] to apply, the predicted effect needs to be reasonably expected to occur... There must be more than merely an assumption or allegation that damage may occur if the document were to be released.*

*6.103 An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect should be identified during the decision making process, including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker’s statement of reasons, if they can be included without disclosing exempt material.*

24. In the case of ‘ABK’ and *Commonwealth Ombudsman* [2022] AICmr 44, the Information Commissioner (IC) found that where the direct contact details of agency staff are not publicly known, they should be conditionally exempt under section 47E(d). The IC made this determination due to reasonable expectation that the release of direct contact details would undermine the operation of established channels of communication with the public. Further, the IC accepted that staff who were contacted directly could be subject to excessive and abusive communications, which may give rise to work health and safety concerns.

25. If the contact details of Defence personnel were to be made publicly available, it would have substantial adverse effects on the proper and efficient operation of existing public communication channels. Further, I am satisfied of a reasonable expectation that the information could be used inappropriately, in a manner which adversely affects the health, wellbeing and work of Defence personnel. Disclosure of names, email addresses and phone numbers could, therefore, reasonably be expected to prejudice the operations of Defence.

26. Accordingly, I am satisfied that the relevant information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

## **Section 47F – Public interest conditional exemptions - personal privacy**

27. Section 47F(1) of the FOI Act states:

*A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).*

28. The FOI Act shares the same definition of ‘personal information’ as the *Privacy Act*

1988 (Cth). Furthermore, the Guidelines provide that:

*6.128 Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

- (a) whether the information or opinion is true or not; and*
- (b) whether the information or opinion is recorded in a material form or not.*

29. I found that the documents contain personal information of individuals.

30. In my assessment of whether the disclosure of personal information is unreasonable, I considered the following factors, in accordance with section 47F(2):

- a. the extent to which the information is well known;
- b. whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
- c. the availability of the information from publicly accessible sources; and
- d. the effect the release of the personal information could reasonably have on the third party.

31. I found that the specific information listed is not well known and the information is not readily available from publicly accessible sources.

32. Accordingly, I am satisfied that the specified information is conditionally exempt under section 47F of the FOI Act.

#### **Public interest considerations - Sections 47E & 47F**

33. Section 11A(5) of the FOI Act states:

*The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.*

34. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act. The relevant factors being whether access to the document would:

- a. promote the objects of the Act; or
- b. inform debate on a matter of public importance.

35. In my view, disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

36. Paragraph 6.22 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to this request are that release of this information could reasonably be expected to prejudice:

- an agency's ability to obtain similar information in the future;
- the management function of an agency;
- the personnel management function of an agency; and
- the protection of an individual's right to privacy;

37. While I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a strong public interest in maintaining the confidentiality of material contained in the documents.

38. It is in the public interest that Defence efficiently and productively operates with regard

for the health and wellbeing of its personnel. As I have established above, the release of the names, email addresses and phone numbers of Defence personnel can reasonably be expected to prejudice the management and personnel management functions of Defence. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of Defence personnel should, therefore, not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.

39. Further, the release of information prepared and produced as a means to inform and advise Defence Ministers on sensitive or key topics arising within the agency can reasonably be expected to prejudice the current processes in place. Disclosing this information may interfere with Defences ability to provide accurate and frank advice to Defence Ministers in the future, and could reasonably be expected to lead to a change in Defence's processes that would not lead to any efficiencies.

40. I have not taken any of the factors listed in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.

41. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and that, on balance, it is against the public interest to release the information to the applicant. Accordingly, I find that the information is exempt under sections 47E(d) and 47F of the FOI Act.

#### **Further Information**

42. Some of the documents matching the scope of this request contained a dissemination limiting marker (DLM). Where documents have been approved for public release, the DLM has been struck through.

Emily

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Accredited Decision Maker  
Strategy, Policy, and Industry Group